

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FREEDOM FROM RELIGION) Docket No. A 16-CA-233 SS
FOUNDATION, INC.)
)
vs.) Austin, Texas
)
GOVERNOR GREG ABBOTT,)
CHAIRMAN OF THE STATE)
PRESERVATION BOARD, ET AL) April 6, 2018

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE SAM SPARKS

APPEARANCES:

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Proceedings reported by computerized stenography, transcript produced by computer.

11:02:17 1 MS. MACKIN: Good morning.

11:02:17 2 This is Anne Mackin on behalf of the defendants, and I

11:02:20 3 am joined by some folks from my office who I'm going to announce

11:02:24 4 but aren't going to be speaking.

11:02:27 5 THE CLERK: Okay.

11:02:28 6 MR. BOLTON: And Rich Bolton is on the line for the

11:02:31 7 plaintiff.

11:02:32 8 THE CLERK: Thank you.

11:02:33 9 MR. BOLTON: And Sam Grover, an attorney at FFRF, is

11:02:36 10 also on the line for the plaintiff.

11:02:42 11 THE COURT: Okay. It appears that there was some sort

11:02:44 12 of agreement to dismiss the interlocutory appeal regarding the

11:02:52 13 issue of whether there's a fact issue regarding the governor, and

11:03:01 14 then, I've got a pleading that the case is settled, but the

11:03:03 15 pleading itself clearly shows the case isn't settled. So I

11:03:10 16 thought we'd better get on the line and find out what is going

11:03:14 17 on.

11:03:14 18 I see where the case is set for trial in October, so

11:03:21 19 you still have some time, but tell me what's going on. It looks

11:03:29 20 like y'all are --

11:03:32 21 MR. BOLTON: Judge, this is Rich Bolton.

11:03:36 22 THE COURT: Yes.

11:03:36 23 MR. BOLTON: In the -- I don't recall the specific

11:03:41 24 date, but in your last decision, you reached a decision on the

11:03:46 25 official capacity viewpoint discrimination issue in favor of the

11:03:52 1 plaintiff and left some other issues, including the personal
11:04:00 2 capacity issue, unresolved. The defendants filed an appeal of
11:04:06 3 that issue on the personal capacity claim, and then,
11:04:12 4 subsequently, the parties by counsel got together and said, well,
11:04:18 5 if we've got a decision on the official capacity claim, if we
11:04:26 6 simply simplify things and dismiss the unresolved claim, then
11:04:33 7 we'd be in a position for your Honor to enter a final judgment on
11:04:38 8 both the agreed dismissed claims and on the claims that the Court
11:04:43 9 has already resolved, in which case, instead of having an
11:04:46 10 interlocutory appeal, there would be a final judgment that the
11:04:50 11 defendants could -- could immediately appeal to the Fifth
11:04:56 12 Circuit.

11:04:56 13 So that's kind of --

11:04:57 14 THE COURT: Well, on the issue of viewpoint
11:04:59 15 discrimination? Are y'all gone? They are gone.

11:05:12 16 THE CLERK: Let's try this again. This is Judge
11:08:35 17 Sparks' chambers. We were disconnected by accident. Are you
11:08:38 18 guys there?

11:08:39 19 MR. MACKIN: Yes, we're still here.

11:08:41 20 THE CLERK: I apologize for that.

11:08:47 21 THE COURT: Well, it's government equipment, so you
11:08:51 22 never know when you're going to get cut off.

11:08:55 23 Okay. So it looks like you want to appeal as a final
11:09:01 24 judgment appealable the viewpoint discrimination portion.

11:09:07 25 MR. BOLTON: Yes, your Honor.

11:09:08 1 THE COURT: And eliminate the personal issues regarding
11:09:14 2 the governor.

11:09:17 3 MR. BOLTON: Yes.

11:09:18 4 THE COURT: Okay. Well, that can be done, however,
11:09:23 5 that would be still involving the cost in attorneys' fees, which,
11:09:32 6 I guess, would result until after the circuit decided.

11:09:38 7 MR. BOLTON: My expectation -- my thought would be, at
11:09:41 8 least in the rules, is that I need to file that motion within 14
11:09:46 9 days.

11:09:46 10 THE COURT: Right.

11:09:47 11 MR. BOLTON: After entry of the final judgment that
11:09:49 12 would be appealable.

11:09:50 13 THE COURT: That's correct. You'd have to do that.

11:09:53 14 Okay.

11:09:54 15 MR. BOLTON: Yeah.

11:09:55 16 THE COURT: But that doesn't mean that it gets decided
11:09:58 17 until the appeal is over.

11:10:01 18 MR. BOLTON: Okay. I understand.

11:10:05 19 THE COURT: If I get decided or if there's an agreement
11:10:08 20 to it, I can enter a judgment, and then, you can merge the two on
11:10:11 21 the appeal. But many times, they don't want that up yet until
11:10:19 22 there's a final judgment.

11:10:22 23 MR. BOLTON: So that I understand, we would still file
11:10:27 24 our motion within the 14 days, and then, the Court may continue
11:10:34 25 that motion until the appeal is resolved; is that correct?

11:10:39 1 THE COURT: After the response of the defendant. In
11:10:42 2 other words, it would be ready for a decision and, frankly, if we
11:10:48 3 get to it -- but if you saw this office right now, you would see
11:10:54 4 that that's the least important item that we have, and I'm
11:11:03 5 talking about from now to September of 2020.

11:11:08 6 But I understand that's what you do. But y'all are
11:11:11 7 arguing about all stuff, for example, injunctive relief and -- so
11:11:24 8 you've got an agreement, but you lawyers can't get a judgment
11:11:30 9 that I could sign that you would agree to that would accomplish
11:11:39 10 your purpose. Is that what you're doing?

11:11:42 11 MR. BOLTON: Judge, on that particular issue, you know,
11:11:45 12 we filed the motion, and then, the state filed the objection in
11:11:50 13 terms of the scope of the injunction. Quite frankly, and
11:11:55 14 attorney Mackin can correct me if I'm wrong, my suspicion is that
11:11:59 15 she and I can probably work out some language that we can both
11:12:03 16 live with on the scope of that injunction.

11:12:05 17 Would you agree with that?

11:12:06 18 MR. MACKIN: Yes, your Honor. This is Anne Mackin.
11:12:11 19 My concern about agreeing to language, agreeing to an
11:12:15 20 order, even as to form, is because we intend to appeal the
11:12:20 21 finding as to liability, we can't represent on the record that in
11:12:24 22 any way sort of the judgment is agreed. So that would be my
11:12:30 23 concern about that.

11:12:30 24 THE COURT: Then I would say you do not have a
11:12:33 25 settlement, and I'll try this God-damn case, pardon the

11:12:38 1 irritation, in September along with my regular docket, you know,
11:12:42 2 and I'm going to try all the issues. Can't have your cake and
11:12:47 3 eat it, too. You want to get the governor out, that's fine. If
11:12:50 4 you want to appeal liability, you're going to have that right,
11:12:56 5 but I'm going to try it and make findings of fact and conclusions
11:13:02 6 of law as all pending issues.

11:13:07 7 The point is, y'all haven't gotten a settlement or a
11:13:12 8 partial settlement, and I'm not going to hang on to this case for
11:13:18 9 a long time. It's waited a long time, y'all have waited a long
11:13:22 10 time, it's going to get concluded from my docket before the end
11:13:25 11 of September.

11:13:27 12 Now, I will work with you in any way, which way. I
11:13:33 13 thought when you got an injunction, the only injunction I think
11:13:36 14 you're going to get, but I haven't seen any pleadings one way or
11:13:41 15 the other was, I thought it would be resolved by a stipulation
11:13:46 16 that the plaintiff could run their exact exhibit for two days in
11:13:54 17 December. That seems, to me, would clear the air and you could
11:14:00 18 get rid of this case with the exception of, of course, attorneys'
11:14:04 19 fees and costs.

11:14:05 20 But if y'all can't clear the air, prepare for trial in
11:14:10 21 September. Now, you got any questions, I'll be glad to answer
11:14:15 22 them.

11:14:17 23 MR. BOLTON: This is attorney Bolton. I don't have any
11:14:19 24 questions.

11:14:20 25 THE COURT: Okay. All right. It's beyond my

11:14:24 1 imagination that confident lawyers can't create a judgment that
11:14:35 2 can't be appealed. I don't know what the Fifth Circuit's going
11:14:39 3 to think about all of this, yes and no, one way or the other, but
11:14:47 4 it appears to be y'all might think about that. What are the
11:14:53 5 damages here, attorneys' fees, costs, they're going to be there
11:14:58 6 one way or the other. And liability is going to be an issue for
11:15:06 7 trial. And the way the Court's thinking, I'm not going to issue
11:15:14 8 an injunction on behalf of the plaintiff for some vague thing in
11:15:19 9 the future.

11:15:20 10 The only thing that's involved in this lawsuit is
11:15:23 11 really a half a day for that exact exhibit to be placed there.
11:15:30 12 But it was to be three days, and it seems to me that that might
11:15:35 13 be a -- an appropriate resolve of the equitable relief. But if
11:15:45 14 y'all don't agree, that's fine. It's my birthday in September,
11:15:51 15 maybe I'll celebrate it by listening to this case.

11:15:56 16 All right. State have any other questions?

11:16:00 17 MR. BOLTON: Not here, your Honor.

11:16:02 18 MR. MACKIN: Your Honor, this is Anne Mackin.

11:16:04 19 Is there anything in the Court's view, since summary
11:16:08 20 judgment has already been entered, on the official capacity, free
11:16:14 21 speech clause claim and kind of the parties have an understanding
11:16:20 22 to move forward kind of by releasing all the other claims, would
11:16:28 23 there be any way that maybe if like the plaintiffs came up with
11:16:30 24 an injunction that sounds like what the Court is contemplating
11:16:34 25 would be appropriate in these facts that -- and it was submitted

11:16:37 1 that the Court would enter that injunction while kind of allowing
11:16:42 2 the defendants to, you know, reserve our right to appeal on the
11:16:50 3 liability finding?

11:16:53 4 THE COURT: Well, if the plaintiff's lawyers are
11:16:57 5 stupid, you could get that.

11:17:02 6 MR. BOLTON: I'll reserve on that, your Honor.

11:17:05 7 THE COURT: Yeah. You know, you're trying to get the
11:17:13 8 issue of the governor out. Well, that's fine, but you still have
11:17:15 9 the main liability, and I'm not going to change my mind on any of
11:17:21 10 that until I hear the trial. The trial basically is going to be
11:17:26 11 on something I've already determined. So all that's extra other
11:17:33 12 than making a good record that you'll both be interested in in a
11:17:37 13 trial, the only other thing is the liability of the governor.

11:17:44 14 You know, that's it.

11:17:48 15 So it seems to me that y'all are all being silly. It
11:17:52 16 seems to me that I'm telling you right now on equitable relief,
11:17:55 17 the whole thing is so silly that it makes me mad and it's been
11:17:59 18 pending a long time, but I don't know what the plaintiff's relief
11:18:04 19 other than winning the lawsuit and getting attorneys' fees and
11:18:07 20 costs, which were one of the primary reasons it was filed.

11:18:13 21 When they asked for this display, they never expected
11:18:17 22 it to be granted. They expected the lawsuit to be on the failure
11:18:24 23 of granting the display for whatever days it was, but it was
11:18:33 24 granted; and then, for whatever reason that y'all both know what
11:18:38 25 the evidence is, because you've taken depositions, and that type

11:18:42 1 of thing, and I expect I'll learn a lot of it in trial. But I
11:18:46 2 can't think of a general injunction other than saying, okay, the
11:18:55 3 display was to be for three days. Come December, they get to
11:19:01 4 display it for three days. Maybe I'm just simple-minded, but
11:19:07 5 that's all I think this lawsuit's about.

11:19:09 6 So y'all get together. If y'all come to an agreement
11:19:14 7 that things can be done and I can get rid of the case, well,
11:19:17 8 that's one thing. If not, there's no harm in trying a case in
11:19:22 9 September. It's a great day to -- it's a great time to try a
11:19:25 10 case. And believe me, I'd rather try this case than the other
11:19:30 11 cases set.

11:19:30 12 I've got cases set where the United States is suing all
11:19:34 13 the banks in the nation and cases where they're suing all of the
11:19:41 14 companies they've brokered and sold all of the mortgages. Are
11:19:51 15 you still there?

11:19:53 16 MR. MACKIN: Yes, your Honor, we're still here.

11:19:56 17 THE COURT: And that's going to start in July. I don't
11:19:59 18 know it will be through in September because they're talking
11:20:01 19 billions of dollars in those cases. So that's the groundwork
11:20:09 20 that we're playing with. Y'all have not settled anything, except
11:20:14 21 you've removed the case from the Fifth Circuit, and if I were
11:20:19 22 you, I wouldn't stick it back in there without a good reason, but
11:20:26 23 I'm not you. Okay. That's the Court's position.

11:20:35 24 So I will issue orders on these motions that are
11:20:37 25 pending along those lines without prejudice to y'all coming back

11:20:41 1 if you get a solution. Hello.
2 (End of proceedings.)
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